ALAGGANDIRAN VELLU

v.

PP

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
KN SEGARA JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: B-05-6-2006]
12 OCTOBER 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Evaluation of evidence by trial judge - Standard of proof - Close of prosecution's case - Conclusion of trial - Evidence of interested witness and accomplice, whether credible - Defence of accused*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Standard of proof applicable - Prima facie case*

CRIMINAL PROCEDURE: *Trial - Conclusion of trial - Evaluation of evidence adduced - Whether prosecution proved its case beyond reasonable doubt*

CRIMINAL PROCEDURE: *Defence - Explanation by accused - Whether a mere denial - Whether case proved beyond reasonable doubt*

EVIDENCE: *Burden of proof - Standard of proof for criminal prosecutions - Close of prosecution's case - Conclusion of trial - Evaluation of evidence at all stages of trial*

EVIDENCE: *Standard of proof - Prosecution to prove elements of offence beyond reasonable doubt - Evaluation of evidence at conclusion of trial*

EVIDENCE: *Witness - Interested witness - Whether witness an interested witness - Corroboration - Whether trial judge exercised sufficient caution in accepting evidence of said witness*

EVIDENCE: *Accomplice - Whether witness an accomplice - Corroboration - Whether evidence of accomplice credible - Whether safe to act on said evidence*

This was an appeal by the accused against the High Court's decision convicting him of the deceased's murder and sentencing him to death under s. 302 of the Penal Code. The accused submitted, *inter alia*, the following grounds: (i) the trial judge had

A erred at the close of the prosecution's case by wrongly evaluating the evidence before him; and (ii) the trial judge was not cautious when accepting the evidence of the deceased's brother, SP3 (an interested witness), and SP7 (an accomplice) wholly without independent corroboration.

B

Held (dismissing the appeal, and affirming the conviction and sentence)

Per KN Segara JCA delivering the judgment of the court:

C **(1)** The trial judge had applied all the correct principles and tests in evaluating the evidence for the prosecution and the defence at all stages of the trial. He also had not erred in his finding of facts and had not occasioned any serious miscarriage of justice or misdirection to warrant the accused's acquittal. A careful perusal of his judgment showed that he was fully aware D that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case and that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. (paras 12 & 13)

E

(2) There was no doubt that SP3 and SP7 were crucial prosecution witnesses on whose testimonies the charge against the accused rested heavily. If their testimonies were rejected, the accused must be acquitted. However, the trial judge was correct in F accepting their evidence as credible. On the facts, SP3 was at the scene and had seen the accused stab his brother. He was surely an interested witness in that he would most certainly wish to have the perpetrator/s punished for his brother's death. All that the law demands is that SP3's evidence be scrutinised G with sufficient caution to safeguard against any temptation to falsely implicate the accused. It was clear that the trial judge had exercised sufficient caution in accepting SP3's evidence. The trial judge made a positive finding that SP7 was an accomplice, and it is a rule of prudence that it is unsafe to act H on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused. In this instance, it was manifest that his evidence was sufficiently corroborated by SP3's evidence and credence must be given to it. They were both at the scene and witnessed the accused stabbing the I deceased. The findings of the pathologist also supported their evidence that the deceased was stabbed with a knife. (paras 14, 15, 16 & 17)

(3) This court was satisfied that the trial judge had considered the accused's defence – that he did not stab the deceased and, on the contrary, it was the deceased who had stabbed him – very carefully and had, at the conclusion of the trial, made a finding that it was a bare denial. He found that the prosecution had proved its case beyond reasonable doubt. (paras 18 & 19)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan tertuduh terhadap keputusan Mahkamah Tinggi menyabitkannya atas pembunuhan si mati dan mengenakan hukuman mati ke atasnya di bawah s. 302 Kanun Keseksaan. Tertuduh menghujah, antara lain, alasan-alasan berikut: (i) hakim perbicaraan telah khilaf pada penghujung kes pendakwaan apabila salah menimbangkan keterangan di hadapannya; dan (ii) hakim perbicaraan tidak berhati-hati apabila menerima keterangan adik-beradik si mati, SP3 (seorang saksi berkepentingan), dan SP7 (seorang rakan jenayah) keseluruhannya tanpa sokongan bebas.

Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan telah menggunapakai semua prinsip-prinsip dan ujian-ujian betul apabila menimbangkan keterangan pendakwaan dan pembelaan pada semua tahap perbicaraan. Beliau juga tidak khilaf dalam mencapai dapatan fakta-faktanya dan tidak mengakibatkan apa-apa salah laksana keadilan atau salah arahan serius yang mewajarkan pembebasan tertuduh. Pembacaan teliti penghakimannya membuktikan bahawa beliau sedar sepenuhnya bahawa standard pembuktian atas pendakwaan pada penghujung kesnya adalah untuk membuktikan suatu kes prima facie dan bahawa pada penghujung perbicaraan mahkamah akan menimbangkan semua keterangan yang dikemukakan dan memutuskan sama ada pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah.

(2) Tidak ada apa-apa keraguan bahawa SP3 dan SP7 merupakan saksi-saksi pendakwaan penting dan pertuduhan terhadap tertuduh amat bergantung kepada testimoni-testimoni mereka. Jika testimoni-testimoni mereka ditolak, tertuduh mesti dibebaskan. Walaupun begitu, hakim perbicaraan bertindak dengan betul apabila menerima keterangan mereka sebagai boleh

dipercayai. Berdasarkan fakta-fakta, SP3 berada di tempat kejadian dan telah melihat tertuduh menikam adik-beradiknya. Beliau semestinya seorang saksi berkepentingan di mana beliau memang ingin orang yang membunuh adik-beradiknya dihukum sewajarnya. Undang-undang hanya meminta supaya keterangan SP3 dikaji dengan cukup berhati-hati untuk mengelak daripada apa-apa godaan untuk membabitkan tertuduh secara palsu. Ia adalah jelas bahawa hakim perbicaraan telah cukup berhati-hati apabila menerima keterangan SP3. Hakim perbicaraan telah membuat suatu dapatan positif bahawa SP7 merupakan seorang rakan jenayah, dan ia adalah suatu rukun kebijaksanaan bahawa ia tidak selamat untuk bertindak atas keterangan seorang rakan jenayah kecuali jika ia disokong dalam aspek-aspek material supaya membabitkan tertuduh. Dalam kes semasa, ia adalah jelas bahawa keterangannya disokong dengan secukupnya oleh keterangan SP3 dan ia seharusnya dipercayai. Mereka kedua-dua berada di tempat kejadian dan telah melihat tertuduh menikam si mati. Dapatan-dapatan ahli patologi juga menyokong keterangan mereka bahawa si mati telah ditikam dengan sebilah pisau.

(3) Mahkamah ini berpuas hati bawah hakim perbicaraan telah menimbangkan pembelaan tertuduh – bahawa beliau tidak menikam si mati dan, sebaliknya, ia merupakan si mati yang telah menikamnya – dengan amat teliti dan telah, pada penghujung perbicaraan, membuat dapatan bahawa ia adalah sesuatu penafian kosong. Beliau mendapati bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

Legislation referred to:
Criminal Procedure Code, ss. 180(1), 182A(1)
Penal Code, s. 302

For the appellant - Rajpal Singh; M/s Rajpal, Fira & Assoc
For the respondent - Kwan Li Sa DPP

Reported by Suresh Nathan

JUDGMENT

KN Segara JCA:

[1] In May 1999 Vikneswaran a/l Nagapan was a 16-year-old teenager. He apparently had a girlfriend named Vickneswari. She is a cousin of Chellah and Baskaran who are brothers. Baskaran is the elder brother of Chellah.

[2] Viveganathan a/l Nagapan is the elder brother of Vikneswaran. They live together in the same house in Sg Buloh. On 3 May 1999 at about 9pm the two brothers went to the ASB Supermarket which is about 2-3 km away from their house to buy two packets of Maggi mee. They went to the supermarket on a m/cycle ridden by Vikneswaran with Viveganathan as the pillion. On their way back home from the supermarket they crossed the path of Chellah and Agilan who were on a m/cycle (ridden by Agilan). Chellah and Agilan are known to Viveganathan and Vikneswaran.

[3] Chellah and Agilan stopped them and invited them to go to a shop to have drinks and talk together. At the suggestion of Chellah they exchanged m/cycles for their destination. Chellah rode the m/cycle Vikneswaran was riding and Vikneswaran became the pillion instead. Viveganathan, on the other hand, became the pillion rider on the m/cycle ridden by Agilan.

[4] Chellah rode ahead as the lead rider with his pillion. Agilan and his pillion followed behind him. Chellah did not proceed to the shop for drinks as intimated earlier. Instead, Chellah led them to an area behind a factory. There, awaiting their arrival at the scene were Baskaran and Mimi.

[5] To Viveganathan's horror, even before he could get down from Agilan's m/cycle, he saw Chellah take out a knife from a bag over Chellah's shoulder and stab his brother in the stomach. When Viveganathan got off Agilan's m/cycle he was held by Mimi and restrained from going to his brother's aid. He was told not to interfere in a problem essentially between Chellah and Vikneswaran.

[6] Vikneswaran fell on to the road and lay prone. Chellah further stabbed him several times again. Then Agilan and Baskaran struck Vikneswaran with a piece of wood. Thereafter, the three assailants and their accomplice, Mimi, fled from the scene, leaving Viveganathan behind with his brother. Vikneswaran was in pain. His body and clothes were smeared in blood. He was still alive and breathing.

[7] Viveganathan went to the house of his friend Chandra Mogan, about 2km away, to seek help for his brother. He returned to the scene with Chandra Morgan in a car to send his brother to the Sg Buloh Hospital. About half an hour after their arrival at the hospital, Vikneswaran succumbed to his injuries.

[8] The forensic pathologist, Dr George Paul (SP9), carried out a post-mortem on the body of Vikneswaran on 4 May 1999 at about 11am. According to the pathologist the cause of death of the deceased was "stab injuries to heart and liver"'.

[9] Allaggandiran a/l Vellu, the appellant (accused) herein, who is also known as Chellah, was charged with the offence of murder for causing the death of the deceased, Vikneswaran. He was found guilty and convicted for the offence of murder punishable under s. 302 of the Penal Code by the learned judge High Court, Shah Alam. He was sentenced to death.

[10] The appeal before us hinges only on four main points. The learned defence counsel urges upon us to acquit and discharge the accused because:

a) The learned trial judge has erred at the close of the prosecution by wrongly evaluating the evidence before him;

b) The learned trial judge was not cautious when accepting the evidence of SP3 (interested witness) and SP7 (accomplice) wholly without independent corroboration;

c) The learned trial judge decided that the discrepancies between SP3 and SP7 is minor and can be disregarded;

d) The learned judge failed to consider that the prosecution had failed to prove that "Mimi" is actually SP7.

[11] We have considered very carefully the submissions of the learned defence counsel. We have perused through the notes of evidence and record of appeal to ascertain whether the prosecution had in fact established a *prima facie* case against the accused at the close of the prosecution's case and, thereafter, at the conclusion of the trial, had proved their case beyond reasonable doubt.

[12] We are satisfied that the trial judge has applied all the correct principles and tests in evaluating the evidence for the prosecution and the defence at all stages of the trial. We are also of the view that he has not erred in his finding of facts. We are unanimous that the trial judge has not occasioned any serious miscarriage of justice or misdirection to warrant the acquittal of the accused. Nevertheless, we are of the view that it was undesirable of the judge to have stated, (perhaps intended only as a matter of observation

without having expressly so stated) "Tertuduh pada tahap ini, tidak ada menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan", in one of the passages of his grounds of judgment. The passage referred to reads as follows:

> Setelah menimbangkan keterangan saksi-saksi pendakwaan dan hujah kedua-dua pihak, saya berpuashati bahawa pendakwaan telah berjaya membuktikan kes *prima facie* terhadap tertuduh dan dengan itu telah memanggil beliau membela dirinya. Tertuduh pada tahap ini, tidak ada menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan.

[13] Such a statement, taken out of context and interpreted for its purported implications without regard to the evidence before the court, could lead to the perception that the trial judge was requiring the accused to establish a doubt on the prosecution's case even before the defence was called. The further perception would be that such failure would lead to the accused's inevitable conviction. If this was in fact rooted in the mind of the trial judge, then he would be guilty of a misdirection on the burden of proof at the close of the prosecution's case. However, upon a careful reading of the paragraph in which the statement appears and all the preceding paragraphs of his judgment, as well as the paragraphs that follow, we are satisfied that he was fully aware that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case (s. 180(1) CPC) and that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt (s. 182A(1) CPC). It is elementary that in criminal law (short of any explicit statutory exceptions to the contrary) the accused is not required to prove his innocence at any stage of a trial. The burden rests squarely on the shoulders of the prosecution throughout the trial to prove the charge beyond reasonable doubt, more so, at the close of the case for the defence (that is, at the conclusion of the trial).

[14] There is no doubt that Viveganathan (SP3) and Nagentharan(SP7) are crucial prosecution witnesses on whose testimony the charge against the accused rests heavily. If their testimony is rejected, then the accused must be acquitted. However, we have no reason to interfere with the trial judge accepting their evidence as credible.

[15] SP3 is the brother of the deceased. His evidence is entitled to credence until cogent reasons for disbelief can be advanced. He was at the scene. He was an eyewitness. He saw the accused stab

his brother. There is no doubt he is an interested witness in that he would most certainly wish to have the perpetrator/s punished for the death of his brother. All that the law demands is that SP3's evidence should be scrutinized with sufficient caution to safeguard against any temptation to falsely implicate the accused. We are satisfied that the trial judge has exercised sufficient degree of caution in accepting SP3's evidence. SP3's evidence on the issue of the deceased being stabbed with a knife is also supported by the pathologist, SP9's findings. In accepting SP3's evidence, the trial judge stated:

> Setelah mendengar dan melihat SP3 memberi keterangan, saya mendapati ia seorang saksi yang boleh dipercayai. Ia tidak memperlihatkan kepada saya sebagai seorang saksi yang berat sebelah. Keterangannya bahawa simati telah ditikam dengan sebilah pisau di perutnya beberapa kali adalah disokong dan konsisten dengan jenis-jenis kecederaan yang dijelaskan oleh SP9. SP9 juga ada memberikan pandangannya bahawa kecederaan yang dialami oleh simati adalah disebabkan oleh senjata tajam.

[16] There is no doubt that SP7 is an accomplice. The trial judge did in fact make a positive finding that SP7 was an accomplice. SP7 did go to the scene with Agilan. He prevented SP3 from giving any assistance to the deceased when he was being stabbed by the accused. SP7 also assaulted the deceased with a piece of wood. He had been arrested by the police as a suspect and then released.

[17] It is a rule of prudence that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused. We are satisfied that his evidence is sufficiently corroborated by SP3's evidence and credence must be given. SP3 and SP7 were at the scene and both had the opportunity to witness the accused stabbing the deceased. Furthermore, the pathologist's findings support SP7's evidence that the deceased was stabbed with a knife. We have no reason to interfere with the trial judge's finding that SP7 was a credible witness. He stated in his judgment as follows:

> Walaupun SP7 seorang rakan jenayah, saya mendapati ia seorang yang boleh dipercayai dan keterangannya adalah disokong oleh SP3, iaitu seorang saksi bebas. Keterangan SP7 bahawa simati telah ditikam dengan sebilah pisau juga adalah consistent dengan kecederaan yang dialami oleh simati seperti yang telah diterangkan oleh SP9 didalam keterangan lisannya dan juga di dalam laporan bedah siasatnya.

> Tidak dinafikan bahawa terdapat percanggahan keterangan di antara SP3 dan SP7, termasuk bagaimana dan dengan siapa OKT pergi ke tempat kejadian dan jarak kedudukan masing-masing dengan tempat simati ditikam oleh OKT. Bagaimanapun saya mendapati percanggahan tersebut adalah percanggahan yang kecil dan tidak material. Ini tidak langsung menjejaskan kredibiliti mereka atau **menimbulkan keraguan mengenai siapa yang menikam siapa dan jenis senjata yang digunakan.** (emphasis added)

[18] The defence of the accused in a nutshell was that he did not stab the deceased and, on the contrary, it was the deceased who had stabbed him. He denied that he had brought along with him any knife when he met the deceased and his brother at the football field. He admitted that on the day of the incident he had told his brother, Baskaran, and his cousin, Agilan, that he was going to search for the deceased and have a talk with the deceased, as the deceased had allegedly been disturbing his cousin Vickneswari.

[19] We are satisfied that the trial judge had considered the defence of the accused very carefully and at the conclusion of the trial made a finding that the accused's defence was a bare denial. He found that the prosecution had proved its case beyond a reasonable doubt and expressed it in his judgment as follows:

> Setelah menimbangkan keterangan pendakwaan dan keterangan pembelaan, saya berpuashati bahawa pendakwaan telah membuktikan kesnya melepasi keterangan yang menasabah dan OKT tidak dapat menimbulkan keraguan yang menasabah terhadap kes pendakwaan. Keterangan OKT sendiri adalah penuh dengan percanggahan dan keterangannya bahawa ia tidak menikam simati adalah merupakan penafian semata-mata.

[20] We are unanimous that this appeal is without merits. We are satisfied the conviction is safe. Appeal is dismissed. Conviction and sentence of the High Court is affirmed.